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# Report of the International Law Commission on the work of its sixtieth session (2008)

## Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-third session, prepared by the Secretariat

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# Introduction

1. At its sixty-third session, the General Assembly, on the recommendation of the General Committee, decided at its 2nd plenary meeting, on 19 September 2008, to include in its agenda the item entitled "Report of the International Law Commission on the work of its sixtieth session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 16th to 26th meetings, from 27 to 31 October and from 3 to 5 and on 14 November 2008. The Committee considered the report in three parts. Accordingly, the Chairman of the Commission at its sixtieth session introduced the report as follows: chapters I to V and XII (Part I) at the 16th meeting, on 27 October; chapters VI to VIII (Part II) at the 18th meeting, on 29 October; and chapters IX to XI (Part III) at the 22nd meeting on 31 October. At the 26th meeting, on 14 November, the Sixth Committee adopted draft resolution A/C.6/63/L.20, entitled "Report of the International Law Commission on the work of its sixtieth session", as orally revised, and draft resolution A/C.6/63/L.21 on the law of transboundary aquifers. The draft resolutions were adopted by the General Assembly at its 67th plenary meeting, on 11 December 2008, as resolutions 63/123 and 63/124 respectively.

3. By paragraph 26 of its resolution 63/123, the General Assembly requested the Secretary-General to prepare and distribute a topical summary of the debate held on the report of the Commission at the sixty-third session of the Assembly. In compliance with that request, the Secretariat has prepared the present topical summary. It consists of nine sections: A. Shared natural resources; B. Effects of armed conflicts on treaties;[1] C. Reservations to treaties; D. Responsibility of international organizations; E. Expulsion of aliens; F. Protection of persons in the event of disasters; G. Immunity of State officials from foreign criminal jurisdiction; H. The obligation to extradite or prosecute (*aut dedere aut judicare*); and I. Other decisions and conclusions of the Commission.

# Topical summary

## A. Shared natural resources

### 1. General comments

4. The present section addresses only comments and observations made by delegations in relation to the oil and gas aspects of the topic.[2] There was general support for the Commission's approach of treating aquifers separately from oil and gas. In the main, it was observed that the challenges of managing transboundary oil and gas reserves were quite different from those relating to transboundary aquifers, invoking different social, economic and commercial implications. For instance, the commercial issues involved provided an incentive for States to cooperate and find practical solutions, through bilateral relationships, to benefit all parties concerned. While the huge economic stake associated with oil and gas resources was

[1] See A/CN.4/606/Add.1.

[2] The majority of comments and observations of delegations on this topic concerned the draft articles on the law of transboundary aquifers, adopted on second reading by the Commission at its sixtieth session (see A/C.6/63/SR.16-19, 21, 22 and 24).

acknowledged, the point was nevertheless made that water had given rise to so-called water wars, that the private sector had long been involved in the management of drinking water, and, accordingly, that there was still a need for collaboration, and legal specialists should not maintain total separation between the two types of resources.

### 2. Consideration of oil and gas

5. As to whether or not the Commission should proceed to oil and gas in its consideration of the topic, different views were expressed by delegations. First, considering the clear similarity to groundwater and the relevance of oil and gas in international relations, some delegations observed that it would be useful to States for the Commission to examine the subject in greater detail. Such consideration would also assist in identifying common elements from State practice. In the light of an emerging obligation under international law to enter into unitization agreements for the development of such resources, it would be helpful to identify the elements that such agreements should have in order to foster the efficient and equitable use of the resources.

6. Second, there were delegations that were reluctant to see the Commission address the topic further. Given that economic and political stakes,[3] as well as fundamental bilateral interests, were associated with such resources, it was argued that any proposal by the Commission to regulate oil and gas resources would probably be controversial. Bilateral mechanisms represented the best way for States to manage such reserves, and, judging from experience, this was an area in which bilateral discussions with other States were guided by pragmatic considerations and based on technical information. It was also suggested that there was no urgent humanitarian need to protect oil and gas resources, as there was in the case of transboundary aquifers. Furthermore, the view was expressed that there was already legal certainty in that area. While acknowledging the existence of considerable State practice, particularly in the field of cooperation on offshore transboundary petroleum resources on the basis of maritime delimitation agreements and subsequent unitization agreements, some delegations pointed out that full consideration of bilateral arrangements would involve a lot of complexity and interface with other disciplines and arrangements. In this connection, it was suggested that it might be more productive for the Commission to note the existence of such practice rather than to make an attempt at codification. Indeed, some delegations doubted the need for any universal rules on shared oil and gas resources or for draft articles on the subject. In view of the unique challenges posed, it was considered imperative that States have the flexibility to create cooperative frameworks on a case-by-case basis. Furthermore, in many cases, oil and gas considerations were linked to questions of maritime delimitation. Accordingly, those delegations doubted that the subject matter was appropriate for the Commission to consider, with some noting that such an exercise would not be productive.

7. Third, the point was nevertheless made that in the event the Commission found it necessary to address the subject matter, it should refrain from considering matters relating to offshore boundary delimitation. The United Nations Convention on the Law of the Sea of 1982 left no doubt that maritime delimitation was a matter for the States concerned and that the question of whether oil and gas reserves were shared

[3] See also A/C.6/62/SR.22, para. 89.

was inextricably linked to the resolution of maritime delimitation claims. Once delimitation agreements were in place, they often contained a unitization clause providing for the joint exploitation of oil and gas deposits straddling the agreed boundary. It was suggested that it could be useful to outline common principles and features, best practices and lessons learned through a review of State practice, which could guide States in negotiating agreements on the partition of oil and gas deposits.

8. Fourth, in the light of the request of the Commission in 2007 for Governments to provide information on State practice, the view was expressed that, while the Commission might continue to conduct preliminary studies, it would be premature to embark upon the codification of the law on that subject before it had received replies from a sufficient number of Governments.

## B. Effects of armed conflicts on treaties

9. For comments on draft articles adopted on first reading, see A/CN.4/606/Add.1.

## C. Reservations to treaties

### 1. General comments

10. Delegations welcomed the Commission's effort to address the issue of interpretative declarations, which had been neglected in the Vienna Convention on the Law of Treaties. It was appropriate to deal, even with great care, with interpretative declarations in conjunction with reservations to treaties since there were links between them as, for example, when interpretative declarations might be disguised reservations. The view was expressed that the interpretative declaration could serve as an aid to interpretation for its author or for a State or an international organization that had approved it. The point was also made that the interpretation put forward in a unilateral declaration by one State party could have effect only with respect to the declaring State unless another State party explicitly aligned itself with that interpretation. It was observed that the use of interpretative declarations was widespread, and in all too many cases they caused difficulty because of their similarity to reservations. The view was expressed that the absence of literature and the scarcity of practice concerning interpretative declarations could have led to seeking solutions inspired by the legal regime of reservations. It was also noted that the Guide to Practice should establish the connection between interpretative declarations and articles 31 and 32 of the Vienna Convention. Interpretative declarations could be considered basic means of achieving agreement on the interpretation of a given provision.

11. The point was made that interpretative declarations and reactions to them formed part of a broader context than the single treaty to which they related and touched on the way in which States interpreted their rights and obligations in international law. Therefore, the Special Rapporteur's caution about undertaking a study of the general theory of acquiescence, for the purposes of the topic, was justified. Similarly, an in-depth consideration of the analogy between approval of an interpretative declaration and agreement between the parties regarding the interpretation of the treaty would go far beyond the scope of the topic.

## 2. Interpretative declarations

12. It was pointed out that it was valid to distinguish between different types of reactions (approval, disapproval, silence and reclassification), although the effect of each raised different problems. It would not be helpful to try to create a separate regime in which acquiescence could play a specific role in regard to interpretative declarations.

13. The approval of an interpretative declaration constituted subsequent agreement on the interpretation in accordance with article 31, paragraph 3 (a), of the Vienna Convention. It was suggested that the Commission draw up specific approval criteria consisting of three features displayed simultaneously: silence, conduct and the lapse of a reasonable length of time. States were under no obligation to react to interpretative declarations, nor could such declarations limit the rights of other parties.

14. The option open to contracting States to clarify or specify the meaning of a treaty or certain provisions thereof should not be ignored. It was suggested that, with regard to the consequences of an interpretative declaration for a State that expressly approved or opposed it, a general reference to customary rules on the interpretation of treaties should be sufficient. Opposition to an interpretative declaration might either restrict or exclude the intended legal consequences of the declaration. Except in cases where contracting States reclassified an interpretative declaration as a reservation, there was an inherent flexibility in the system of interpretive declarations and the reactions that they produced in accordance with the essential role played by the intention of the parties and their interpretation of the treaty.

15. The view was also expressed that the term "reclassification" created grounds for misinterpretation and risked giving the impression that the reservation in disguise could have been an interpretative declaration until it was "reclassified". The real intent should be to "interpret" the interpretative declaration and decide whether or not it constituted a reservation. The use of unconventional terms might give the impression that the Commission wanted to rewrite the Vienna Convention regime. It was pointed out that the practice of severing invalid reservations from the treaty relations between the States concerned was in accordance with article 19 of the Vienna Convention; it also opened the possibility of dialogue within the treaty regime.

16. It was suggested that conditional interpretative declarations could be considered as interpretative declarations if the interpretations contained therein were acceptable. Doubts were expressed about the category of conditional interpretative declarations that in fact constituted reservations and as such the reservations regime should apply to them. According to another point of view, it was premature to rule on whether that type of declaration constituted an interpretative declaration or a reservation. Further analysis should be carried out in order to establish clearly the legal nature of conditional interpretative declarations and to identify the legal effects and procedures associated with them. According to another point of view, the distinction between simple and conditional interpretative declarations was contrived and entailed methodological consequences.

17. It was observed that States, when acceding to or ratifying a treaty, often issued declarations that contained elements of a political nature; such declarations might constitute a third category of interpretative declarations.

18. The view was expressed that the question of the consequences of interpretative declarations should be considered in the light of the principle of estoppel. A State that had made an interpretative declaration should not be able to subsequently renounce or change its declaration without the agreement of other States or international organizations that had approved the proposed interpretation. It was also suggested that since interpretative declarations had no legal effect, it made no sense to treat the consequences of an objection to a declaration as being similar to the consequences of an objection to a reservation. Unjustified objections, which could be dictated by purely political considerations, should not be seen as acts giving rise to legal consequences.

19. The point was also made that the legal effect of objections was an important aspect of the topic. Since objecting States seemed to disregard the reservation on that objection, an emerging custom might seem to modify the rules set out in the Vienna Convention.

20. The view was expressed that the time frame for objecting to a reclassified interpretative declaration should not be the same as that for objecting to a reservation. It was a mistake to use the analogy of reservations and objections when dealing with interpretative declarations. The onus of clarifying the intention behind a unilateral statement was on the author of the statement; other States parties had a legitimate expectation that the author State would label its statement appropriately.

21. It was observed that a unilateral declaration could result in an agreement between the parties or a practice whereby they agreed on the meaning of the treaty.

22. According to another point of view, the subject of reactions to interpretative declarations was not ripe for codification and went beyond the original mandate of the topic. There was insufficient State practice, and the general regime put forth was not advanced enough to address what little practice existed. Moreover, the terms "approval" and "opposition" implied that a State's reaction had legal consequences for the interpretative declaration, which would rarely, if ever, be the case. The proposed guidelines went beyond the progressive development of international law to promote a new legal regime where one did not exist. States often used interpretative declarations simply to avoid the formal limitations involved when using reservations; consequently, such limitations should not extend to interpretative declarations. The introduction of detailed guidelines on interpretative declarations might not only affect the role of those declarations but might make the guidelines themselves hard to apply.

### 3. Silence as a reaction to interpretative declarations

23. The view was expressed that the legal consequences of silence in response to an interpretative declaration should be assessed in the light of article 31, paragraph 3 (a), of the Vienna Convention.

24. It was observed that there were circumstances in which silence in response to an interpretative declaration could be construed as acquiescence. It was observed that the issue of acquiescence should be ascertained by reference to international law or further elaborated. Since there was no time limit on reacting to interpretative

declarations, it would be hard to determine when the silence of other contracting States could be deemed acquiescence. Silence could not constitute acquiescence when there was no duty to react.

25. It was pointed out that circumstances could not be envisaged in which silence in response to an interpretative declaration could be taken definitively to constitute acquiescence. However, the acceptance of an interpretative declaration could not be presumed and could not be inferred from the lack of silence. Several delegations agreed that consent to an interpretative declaration should not be inferred from silence.

26. There were circumstances in which silence or the conduct of a State would be inevitably taken into account for the purposes of interpretation of the treaty in the event of a dispute between two contracting States.

27. On the other hand, while silence against a reservation constituted acceptance with the sole exception of reservations incompatible with the object and purpose of the treaty, silence against interpretative declaration could never give rise to any legal effects.

28 Silence did, however, have a legal effect in cases where, according to general State practice, a protest against the interpretation given would be expected from the State or international organization concerned.[4]

29. It was suggested that silence was prima facie evidence of agreement, particularly in the case of treaties the subject matter of which would require a prompt reaction from States parties.

30. The view was expressed that silence in response to an interpretative declaration denoted indifference rather than approval or opposition. More careful study was needed in order to determine under which specific circumstances silence might be construed as acquiescence.

31. Under certain circumstances, the combination of the interpretative declaration, silence and the resulting mutual expectation of the declaring State and the silent State — as well as of third States — could result in the attribution of an effect to the silence that would be difficult to assess, falling between acceptance of the interpretative declaration and a waiver of the position that the silent State might have held up until that time. Such circumstances should be decided case by case on the basis of the content of the interpretative declaration, the specific situation in which the silence occurred and the previous position of both States on the issue.

### 4. Comments on specific draft guidelines

#### Guideline 2.1.9: Statement of reasons

32. It was observed that the recommendation in draft guideline 2.1.9 that a reservation include the reasons it was being made, although useful and reflecting some usage, did not correspond to general practice. However, the importance of formulating reservations in a clear and well-defined manner that allowed their precise scope to be determined should not be diminished. It was also pointed out that this recommendation might result in limiting the freedom of States to formulate reservations, and the Vienna Convention did not require such reasons. On the other hand, support

[4] North Atlantic Coast Fisheries case (Great Britain v. United States of America).

was expressed for any effort to encourage greater clarity in the formulation of reservations. The number of objections to reservations might be reduced if the parties to the treaty had greater insight into the reasons for a State's reservation. It was also observed that reasons were often highly political and that the authors of reservations and objections tended to avoid explaining them.

**Guideline 2.6.5: Author**

33. It was noted that this guideline provided for an objection by States or international organizations entitled to become parties to the treaty whereas article 20 of the Vienna Convention of 1969 referred simply to "another contracting State".

34. Doubts were expressed concerning the right of States or international organizations entitled to become parties to the treaty to formulate objections before becoming contracting parties. Declarations made by this category of States and international organizations did not produce any legal effect and their mention had no place in the Guide to Practice. Support was also expressed for this guideline, although it was mentioned that an approach based on the legal consequences of an objection rather than its subjective character might be preferable. Moreover, the guidelines did not cover cases in which a treaty was being applied provisionally when reservations and objections could also have legal effects. It was suggested that a requirement be added to confirm the objection at the time of signature.

**Guideline 2.6.10: Statement of reasons**

35. It was pointed out that the recommendation on this guideline encouraging the statement of reasons for an objection was necessary. Objections were made both to admissible reservations and to reservations considered inadmissible. Since the legal consequences differed, the reasons for the objection should be indicated.

**Guidelines 2.6.13/2.6.15: Time period for formulating an objection and late objections**

36. It was suggested that the 12-month deadline for an objection was too rigid and implied presumption of the acceptance of a reservation when no objection had been made within 12 months. Objections had often been made after the expiry of the 12-month period, and the guidelines should reflect this practice.

**Guidelines 2.6.14/2.6.15: Conditional objections and late objections**

37. It was pointed out that conditional objections and late objections should be treated in the same way. As for late "objections", they could not alter the legal consequences of the reservation even if the author of the "objection" tried to persuade the author of the reservation to accept it. The guideline should rather be entitled: "late notification of an objection".

**Guideline 2.9.1: Approval of an interpretative declaration**

38. It was suggested that the term "consent" would be more appropriate in relation to interpretative declarations and should replace the word "approval".

**Guideline 2.9.3: Reclassification of an interpretative declaration**

39. Doubts were expressed concerning the reclassification of an interpretative declaration. The formulation in draft guideline 2.9.3 gave the impression that an individual State could determine on its own whether the declaration was interpretative or a reservation.

40. It was pointed out that this guideline should be taken into account in the examination of interpretative declarations formulated with regard to treaties that did not expressly allow or prohibit the formulation of reservations; furthermore, account should simultaneously be taken of guidelines 1.3 and 1.3.3.

41. It was also pointed out that there was no need for further categorization, particularly since the determination of whether an interpretative declaration constituted a reservation was based on an objective definition of the term "reservation".

42. It was pointed out that States and international organizations should not have the right to reclassify an interpretative declaration made by another State or international organization.

43. The view was expressed that the capacity of other States parties to reclassify what the author State had classified as a mere interpretative declaration would be limited by the fact of such declaration being subject to the time frame applicable to objections to reservations. Practitioners and depositaries needed guidance on the form and legal effects of reactions to disguised reservations. An extension of the 12-month time limit could be adapted to cases of "disguised reservations", thus allowing 24 months for the formulation of objections and averting the risk that a disguised objection, by passing unnoticed as an interpretative declaration, would benefit from the same time limit as a reservation formulated as such.

**Guideline 2.9.4: Freedom to formulate an approval, protest or reclassification**

44. It was observed that there should be a time limit (12-month deadline) for the formulation of a reclassification.

45. It was suggested that a State or an international organization should not be able to formulate an interpretative declaration in respect of a treaty or certain of its provisions in the context of a dispute-settlement process involving the interpretation of the treaty or the provisions in question. A reference to the principle of good faith would be useful.

**Guideline 2.9.9: Silence in response to an interpretative declaration**

46. It was observed that the relationship of this guideline to guideline 2.9.8, Non-presumption of approval or opposition, required further clarification and more precise definition of the phrase "certain specific circumstances", since it gave rise to presumptions about an interpretative declaration, while guideline 2.9.8 provided for the non-presumption of approval of or opposition to an interpretative declaration.

## D. Responsibility of international organizations

### 1. General comments

47. Delegations commended the Commission and the Special Rapporteur for the results achieved during the past year. It was emphasized that the responsibility of international organizations and State responsibility were the two pillars of international responsibility under a basically uniform system taking into account certain inherent differences between States and international organizations.

48. Support was given by some delegations to following the general pattern of the articles on State responsibility, with adaptations rendered necessary by the specificity and diversity of international organizations, the number and activities of which had increased to the extent that a set of general rules was justified. The assumption that the articles on State responsibility established a model template for the responsibility of international organizations was, however, criticized by some delegations, as was an automatic repetition of the articles adopted in 2001, given the fundamental differences between States and organizations and the diversity of the latter. It was suggested that extension by analogy with the regime of State responsibility should be limited to well-established rules, or that the Commission should focus its study on specific issues raised by the responsibility of international organizations and on problems faced by them in contemporary practice. The general nature of the draft articles made it necessary to scrutinize the meaning and scope of some of them.

49. As to the future consideration of the topic, support was expressed for the proposal to have some issues revisited by the Commission before the end of the first reading in the light of comments received and for the organization of a meeting of the Commission and legal advisers of international organizations.

### 2. Comments on specific draft articles

50. Several delegations expressed support for the draft articles dealing with the invocation of responsibility of an international organization. The lack of treatment of the invocation of the responsibility of a State by an international organization was emphasized, especially in cases of breaches of obligations owed to the international community as a whole.

#### Draft article 46: Invocation of responsibility by an injured State or international organization

51. The relationship between the right of an international organization to invoke responsibility, based on the implied powers doctrine, and the scope of its personality was emphasized. It was suggested that a distinction be drawn as to the possibility for an organization to invoke the responsibility of member States and third States. The view was also expressed that cases in which the obligation breached by an organization had an *erga omnes* character deserved attention in the context of draft article 46.

#### Draft article 48: Admissibility of claims

52. Support was expressed for the flexible approach, consisting in respecting the rules on the nationality of claims and the exhaustion of local remedies when

applicable. It was indicated that the rule of nationality of claims did not apply to cases of functional protection by an international organization of its officials. As to the rule regarding the exhaustion of local remedies, it was emphasized that only the available and effective remedies offered by international organizations, namely those including internal tribunals and bodies, should be exhausted. Some delegations called for further clarification of the notion of local remedies in that context.

**Draft article 49: Loss of the right to invoke responsibility**

53. Further clarification was called for as to the lapse of time necessary for the loss of the right to invoke responsibility and as to the identification of the organ competent to waive the claim of an organization. The need to take into account the rules of the organization concerning the competence to waive a claim was also emphasized.

**Draft article 50: Plurality of injured States or international organizations**

54. The absence of an indication of priority among entities injured by an act of an organization was noted. It was suggested that the Commission could stress the need for good-faith solutions on a case-by-case basis to avert the risk of concurrent claims.

**Draft article 51: Plurality of responsible States or international organizations**

55. In the case of a plurality of responsible States and international organizations, doubts were expressed as to the order of invocation of the primary responsibility of the organization and the subsidiary responsibility of its members. It was indicated that, at least for cases covered by draft articles 25 to 28, the injured State or organization should have the right to decide the order of invocation. Another view was that the primary responsibility of the organization should have precedence over the subsequent responsibility of member States to maintain a system different from that of joint and several liability. Some other delegations considered that States members of international organizations had no additional obligation to make reparation for the organization's wrongful act or that subsidiary responsibility remained subject to the characteristics and rules of the organization. Further elaboration of the reasoning was also called for on the basis of the specificities of mixed agreements and the intention of the parties regarding their implementation.

**Draft article 52: Invocation of responsibility by a State or an international organization other than an injured State or international organization**

56. The possibility for States or organizations other than the ones injured to invoke the responsibility of an international organization was endorsed by some delegations but questioned by others, at least in case of a breach of an obligation owed to the international community as a whole. Support was expressed for limiting the invocation of responsibility for breach of an obligation owed to the international community as a whole to those organizations which were, even implicitly, entrusted with the function of safeguarding the interests of the international community. It was also indicated that the invocation of responsibility by a non-injured party of a group should be subject to a consensus within that group as to the need to invoke responsibility and, more broadly, that organizations had a duty to cooperate to end a

serious breach by another organization, within the limits allowed by their constituent instruments.

**Draft article 53: Scope of this part**

57. The view was expressed that further study was needed regarding the possibility for individuals to invoke the responsibility of an international organization.

### 3. Countermeasures

58. Several delegations welcomed the inclusion of provisions on countermeasures. It was noted in that regard that international organizations would be limited in the fulfilment of their mandates if they were not given a restricted right to resort to countermeasures. A distinction should be made between preventing international organizations from taking countermeasures and limiting their use to cases of non-performance of conventional obligations by the injured organization. The view was expressed that in the case of a breach of an obligation owed to the international community, resort to countermeasures should be limited to organizations entrusted with the function of safeguarding the underlying general interest.

59. Other delegations, however, urged the Commission to reconsider the necessity of a separate chapter on countermeasures, emphasized the archaic character of the notion or questioned the opportunity of introducing specific provisions given the functions performed by international organizations in the centralization of the international community. It was suggested that the issue of countermeasures should have been dealt with in a distinct study. Several delegations recommended a cautious approach, avoiding the mere reproduction of the articles on State responsibility, in view of the limited practice and the uncertainties of the legal regime.

60. Reservations were expressed as to the possibility for member States to take countermeasures against a responsible organization, particularly given the scarcity in practice of such countermeasures; further clarification was called for in that regard. Some delegations considered that measures taken by members of the organization should primarily, if not exclusively, be governed by the rules of that organization. In any event, resort to countermeasures by member States should not hamper the functional competence of the organization for the general interest; in addition, the rights of States that had not supported the commission of the wrongful act by the responsible organization should be protected.

61. Several delegations noted that measures taken by an organization against its members should be regarded as sanctions rather than countermeasures and be governed by the rules of the organization. It was specifically emphasized that countermeasures should be distinguished from sanctions under the Charter of the United Nations. In any case, the relationship between an organization and its members should be treated differently from that between the organization and non-members, especially following breaches of *erga omnes* obligations. The view was expressed, however, that resort to countermeasures by an organization against its members, and vice versa, was possible, with due respect for the rules and means of performance provided by the organization.

62. It was also indicated that countermeasures taken by States against an international organization should be distinguished from those taken by other organizations and that the possibility for organizations other than the injured one to take countermeasures was doubtful.

63. On more specific issues, it was noted that the need to guarantee the inviolability of agents of international organizations should be limited to agents actually benefiting from such inviolability, and that countermeasures may not be taken in case of a dispute pending either before a court or tribunal or before another body having the power to make decisions binding on the parties.

## E. Expulsion of aliens

### 1. General comments

64. While the importance of taking into account contemporary State practice — including relevant treaties and declarations — was underscored, some doubts were expressed regarding the suitability of this topic for codification and progressive development. It was said that no apparent need for codification existed in certain areas, such as labour migration.

### 2. Scope of the topic

65. It was stated that issues relating to non-admission, extradition, rendition and other transfers should be clearly excluded from the scope of the topic. The same view was expressed with regard to expulsions in situations of armed conflict and issues relating to the status of refugees, non-refoulement and the movement of populations.

66. Some delegations questioned the appropriateness of the Commission's dealing with issues relating to nationality, the expulsion of nationals, including those having more than one nationality, and denationalization in relation to expulsion. According to another point of view, the legal situation of persons with dual or multiple nationalities, as well as the issue of denationalization in relation to expulsion, deserved further study by the Commission.

67. It was observed that the Commission should, to the extent possible, avoid dealing with side issues such as the protection of the property rights of an expelled person.

### 3. Definitions

68. It was stated that the proposed definition of "territory" in draft article 2 as "the domain in which the State exercises all the powers deriving from its sovereignty" was vague and could give rise to overly expansive interpretations. The view was also expressed that no separate definition of the term "conduct", as suggested by the Special Rapporteur, was needed in relation to the definition of "expulsion". Moreover, it was proposed that the Commission clarify that the term "refugee" should be defined in accordance with each country's existing obligations.

### 4. Right of expulsion and its general limitations

69. Some delegations emphasized the need to establish a proper balance between the sovereign right of States to expel aliens and the limitations imposed on that right by international law, in particular those relating to the protection of human rights and to the treatment of aliens. It was also observed that the right of States to expel aliens entailed their corresponding obligation to readmit their own nationals.

70. It was stated that expulsion should be based on legitimate grounds, such as public order and national security, as defined in the domestic laws of the expelling State. The point was made that the draft articles should recognize that aliens unlawfully present in the territory of a State can be expelled for that reason alone and might be subject to different removal procedures.

### 5. Expulsion of nationals and the legal situation of persons with dual or multiple nationality

71. Some delegations expressed support for the view of the Special Rapporteur that it was not appropriate to elaborate draft articles dealing with nationality and, in particular, with the legal situation of persons having dual or multiple nationality regarding expulsion.

72. While some doubts were raised as to the appropriateness of including a draft article on the non-expulsion of nationals, several delegations underlined that the expulsion of nationals was prohibited under international law. It was also stated that the principle of non-expulsion of nationals was a basic human right recognized by customary international law. While some delegations pointed to the absolute character of the prohibition against the expulsion of nationals, others were of the opinion that certain derogations may be envisaged in exceptional circumstances. It was nevertheless said that any exception to that prohibition should be narrowly construed and carefully drafted.

73. Several delegations supported the Commission's conclusion that the principle of the non-expulsion of nationals applies also to persons who have legally acquired one or several other nationalities.[5] It was suggested that this point be reflected in draft article 4 or be clarified in the commentary. Some delegations also observed that the criterion of the "effective" or "dominant" nationality could not justify a State treating one of its nationals as an alien for purposes of expulsion. According to another view, the principle of the non-expulsion of nationals was ordinarily not applicable to those with dual or multiple nationalities, and there was also a need to clarify the notion of "effective" nationality.

### 6. Loss of nationality, denationalization and expulsion

74. Some delegations emphasized the right of every person to a nationality and the right not to be arbitrarily deprived of one's nationality. While the view was expressed that denationalization was prohibited by international law, some delegations were of the opinion that denationalization could be allowed in exceptional circumstances. It was stressed by some delegations that denationalization must not lead to statelessness; that it must take place in

[5] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 171.

conformity with national legislation; that it must be non-discriminatory; and that it must not be resorted to in an arbitrary or abusive manner. Some delegations agreed with the Commission's conclusion that States should not use denationalization as a means of circumventing their obligations under the principle of the non-expulsion of nationals,[5] and a proposal was made to include a draft article to that effect. Some delegations shared the view of the Special Rapporteur that it was not appropriate for the Commission to elaborate draft articles relating to the loss of nationality or denationalization in relation to expulsion. It was also stated that a reference in the commentary to the rules on nationality would suffice, considering that questions of loss of nationality or denationalization may arise independently of any subsequent expulsion.

### 7. Expulsion of refugees and stateless persons

75. It was suggested that the text of draft article 5, dealing with refugees, should follow more closely the language of the Convention relating to the Status of Refugees of 1951 and should take into account the distinction made therein between refugees lawfully and unlawfully present in the territory of the expelling State (see articles 31 and 32). It was observed that the principle of the non-expulsion of stateless persons, as enshrined in draft article 6, was not well established in international law.

### 8. Collective expulsion

76. The view was expressed that collective expulsion was contrary to international human rights law and, in particular, to the principle of non-discrimination.

### 9. Final form

77. It was suggested that the Commission focus its work on the development of a set of general principles, instead of elaborating draft articles purporting to codify customary law. It was also proposed that the Commission proceed, for the time being, to identify the key general principles relating to the subject, without prejudging the eventual form of the final product.

## F. Protection of persons in the event of disasters

### 1. General comments

78. A number of delegations expressed support for the Commission's consideration of the topic, which would have practical benefits for populations in distress.

### 2. Scope of the topic

79. Some delegations expressed a preference for restricting the scope *ratione materiae* of the topic to natural disasters, excluding man-made disasters. Some other delegations preferred a more comprehensive approach covering both natural and man-made disasters. It was generally agreed that legal issues already covered by other areas of international law, including international humanitarian law and international environmental law, should be excluded from the purview of the topic.

80. As for the scope *ratione temporis*, several delegations spoke in favour of a more holistic approach, focusing on the various phases of a disaster: prevention, response and rehabilitation. Some other delegations expressed a preference for focusing initially on response measures, leaving the decision of whether to consider questions of prevention and preparedness for a later stage. The view was also expressed that the question of rehabilitation had no basis in international law.

81. Concerning the scope *ratione personae*, the point was made that the main concern should be to protect natural persons who were victims of such disasters; the inclusion of legal persons was to be contemplated at a later stage. It was also suggested that the protection of persons could encompass the protection of the property of victims. Furthermore, the scope *ratione loci* could be defined as encompassing disasters with transboundary effects.

### 3. Focus of the Commission's work

82. Several suggestions were made regarding the focus of the Commission's work, including defining the concept of protection and then determining the rights and obligations of the different actors involved in disaster situations under existing international law; considering the question of the rights and obligations of third States in relation to the right to humanitarian assistance and the responsibility to protect; analysing the legal issues involved in international cooperation in disaster relief; and identifying areas of common understanding on preventive measures, readiness and capacity-building, the coordination of relief and assistance, the provision of technical assistance and expertise to meet immediate humanitarian needs and appropriate cost-sharing arrangements between States providing and receiving disaster assistance. It was also suggested that the Commission could more clearly define the focus of the study, particularly the terms "protection" and "disaster".

83. Several delegations also supported taking a human rights-based approach covering the rights of both the victims and the affected States. Examples cited in relation to the former included the right to life, food, shelter and health, as well as non-discrimination. It was also suggested that there could be an analysis of which rights could be suspended in case of disaster and which rights could not, as well as the consequences of those rights, including their implementation and enforcement. It was further suggested that, in taking a rights-based approach, a balance needed to be struck between the interests of the victim, the donor States or non-State actors and the affected State. Some other delegations expressed doubts about taking a rights-based approach; such an approach might not be realistic in the light of the prevailing state of international law and could lead to a duplication of existing human rights instruments.

84. It was further proposed that the primary focus of the Commission's work should be on the right of the victims to humanitarian assistance. Several delegations reiterated the view that humanitarian assistance efforts should nonetheless be based on the principles of humanity, impartiality, neutrality and non-discrimination, as well as sovereignty and non-intervention.

85. It was maintained that the principles of sovereignty and non-intervention should not mean that a State affected by a disaster may deny victims access to assistance, and it was suggested that if the affected State was unable to provide the goods and services required for the survival of the population, it must cooperate

with other States or organizations willing and able to do so. Other delegations emphasized the importance of international assistance being provided to persons in the territory of the affected State only with that State's consent and under its supervision and solely on the basis of humanitarian considerations, without inappropriate political or other conditions being attached.

86. Attention was also drawn to the 2003 resolution on humanitarian assistance of the Institute of International Law, which had reflected a consensus that States were permitted to offer such assistance but could not render it without the consent of the affected State. It was also recalled that in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the International Court of Justice had held that the provision of strictly humanitarian assistance to persons or forces in another country, whatever their political affiliations or objectives, could not be regarded as unlawful intervention or as in any other way contrary to international law.

87. Several delegations were of the view that the concept of responsibility to protect was relevant to the topic. Other delegations were of the view that the concept was not relevant to the topic, as the State concerned bore primary responsibility for the protection of persons in its territory or within its jurisdiction and because the concept was confined to extreme circumstances, such as persistent and gross violations of human rights, which could not automatically be applied to the topic of disaster relief. Still other delegations were of the view that a State's duty not to reject an offer of help arbitrarily and to allow access to victims could be deduced from human rights law, irrespective of any responsibility to protect.

### 4. Final form

88. Support was expressed for the approach of elaborating draft articles without prejudice to their final form. A preference was also expressed for the eventual instrument developed by the Commission taking the form of non-binding guidelines, in line with other relevant international instruments, such as the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, adopted at the thirtieth International Red Cross and Red Crescent Conference, in 2007. While reference was made to the importance of cooperation with other stakeholders, including the International Federation of Red Cross and Red Crescent Societies, the Commission was cautioned to avoid unnecessary duplication.

## G. Immunity of State officials from foreign criminal jurisdiction

### 1. General comments

89. Some delegations emphasized the relevance of this topic and the usefulness of the codification effort by the Commission. The preliminary report of the Special Rapporteur was generally welcomed.

90. Some other delegations cautioned that the study of this topic by the Commission should take into account the balance of competing interests involved, namely, the prevention of impunity on the one hand and the stability of inter-State relations and the protection of the State's ability to perform its functions on the other.

### 2. Delimitation of the topic

91. Some delegations supported the delimitation of the topic proposed by the Special Rapporteur. They expressed their agreement with the proposal that the Commission should not examine the immunities of diplomatic agents, consular officials, members of special missions and representatives of States in and to international organizations, as well as issues of immunity of officials before their own State's jurisdiction. While some delegations supported the suggestion that the immunity of State officials before international criminal tribunals should be excluded from the scope of the topic, some other delegations were of the view that this question could not be ignored by the Commission.

92. While some delegations encouraged reference to State practice on immunity from foreign civil jurisdiction, some other delegations suggested that this issue was too different in nature from the present topic for such practice to be used.

### 3. Sources

93. Some delegations explicitly supported the Special Rapporteur's view that the source of the immunity of State officials from foreign criminal jurisdiction was not international comity but international law, particularly customary international law.

### 4. Immunity and jurisdiction

94. Some delegations indicated that the scope of the immunity of State officials should be determined by reference to its rationale, which was considered to be mainly functional. According to another view, the rationale for immunity was a combination of representative and functional necessity.

95. Some delegations agreed with the Special Rapporteur's statement that the issue of immunity may be studied without consideration of the substance of the question of jurisdiction as such. However, while some delegations encouraged an examination of the practice of universal jurisdiction, some other delegations noted that the latter should be excluded from the topic. Some delegations concurred with the Special Rapporteur that the immunity of State officials from foreign criminal jurisdiction was primarily procedural in nature. It was indicated that immunity constituted a limitation of the exercise of jurisdiction and did not imply positive duties.

96. Some delegations noted that immunity was effective throughout the course of criminal proceedings. Some other delegations expressed their interest in the Commission considering the effect of immunity in the pretrial phase and the question of inviolability of State officials.

97. It was suggested that a question that deserved further consideration was whether the immunity of State officials other than Heads of State, Heads of Government and foreign ministers had to be claimed actively by the officials' home State and whether the State thereby assumed responsibility for any wrongful act committed by that person. It was also emphasized that immunity did not release the State official from his or her obligation to abide by the law of the territorial State or from his or her criminal responsibility.

98. Some delegations noted that the immunity covered both the official and private acts of State officials and suggested that the Commission also study this distinction.

### 5. Persons covered

99. Some delegations supported the proposal that the Commission consider the immunity of all State officials, including former officials. Other delegations, on the contrary, suggested that the scope of officials covered by immunity should be more limited. The Commission was called upon to study further the categories of State officials enjoying immunity. In this regard, some delegations favoured a definition or specification of the concept of "State officials". It was emphasized that, in so doing, the Commission should distinguish the status of different categories of officials. According to one view, immunity did not continue after the expiration of an official's period of service.

100. It was suggested that the Commission should further explore the distinction between immunity *ratione materiae* and immunity *ratione personae* to determine the scope of immunities enjoyed by State officials.

101. With regard to immunity *ratione materiae*, some delegations were of the view that it covered all officials, while other delegations considered that certain categories of State officials did not enjoy immunity. It was suggested that the Commission could study the issue of immunity of military personnel stationed abroad.

102. Some delegations noted that immunity *ratione personae* was enjoyed by Heads of State, Heads of Government and foreign ministers. Some delegations argued that other high-ranking officials may also be covered by personal immunity. Some other delegations encouraged the Commission to explore this issue further to determine whether other categories of State officials enjoyed immunity under customary law and to find the relevant criteria for their identification. According to one view, personal immunity shall be limited to officials having a representative function.

103. Some delegations expressed the view that the relevant case law of the International Court of Justice, notably its judgments in the *Arrest Warrant* case and in the recent *Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v. France*) reflected the state of international law in the field.

104. While some delegations saw no merit in examining the question of recognition of States and Governments, others supported the study of the effects of non-recognition on the granting of immunity. It was suggested that the Commission could limit itself to including in the draft a savings clause on this issue.

105. Some delegations favoured consideration of the immunities of family members of State officials. Others were of the view that this question should not be addressed, since family members did not have immunity under customary international law, with the possible exception of the family of a Head of State. It was also suggested that the Commission could include a savings clause on the matter.

### 6. Exceptions to immunity

106. Some delegations supported further study by the Commission of the question of possible exceptions to immunity for serious international crimes. It was pointed out that the question of whether international crimes could be said to be committed in a non-official or private capacity was relevant in this regard. It was also noted that there were means by which impunity could be resisted, regardless of the

existence or otherwise of exceptions to the rule of immunity. Some other delegations, however, called for a cautious approach to this issue.

107. Some delegations affirmed that there was an exception to immunity in case of serious international crimes. It was argued by some delegations that this exception was limited to immunity *ratione materiae*.

108. Some delegations pointed to the relevance of the principle of universal jurisdiction in this regard. Others emphasized, however, that the abusive exercise of universal jurisdiction should be avoided.

109. It was further suggested that the Commission should determine the scope of immunity and possible exceptions to it on the basis of the jurisprudence of the International Court of Justice. Some delegations observed that, in addressing this issue, the Commission should also take into account the provisions relating to crimes punishable by international criminal tribunals and national legislation implementing the Rome Statute of the International Criminal Court. The view was expressed that the Commission should propose that future international criminal courts respect the immunities of State officials under customary international law and that charges for serious human rights violations should be brought only after a proper investigation has been conducted.

110. Some delegations encouraged the Commission to also examine other possible exceptions to the immunity of State officials. It was noted that spies and foreign agents carrying out unlawful acts in the territory of a State did not enjoy immunity from foreign criminal jurisdiction.

## H. The obligation to extradite or prosecute (*aut dedere aut judicare*)

### 1. General comments

111. Some delegations highlighted that the obligation to extradite or prosecute contributed to the combat against impunity by denying safe havens to the persons accused of certain crimes. Other delegations welcomed the establishment by the Commission of a working group on the topic.

### 2. Customary character of the obligation

112. Some delegations considered that the source of the obligation to extradite or prosecute was not limited to international treaties and was customary in nature, notably for serious international crimes. Among the crimes referred to in this context by some delegations were piracy, slave trade, apartheid, terrorism, torture, corruption, genocide, crimes against humanity and war crimes. Other delegations, on the contrary, were of the view that the obligation did not exist beyond the provisions of international treaties. It was indicated, in this regard, that the customary character of the obligation could not necessarily be inferred from the existence of customary rules prohibiting specific international crimes. According to some delegations a customary rule might be in the process of emerging in the field. It was also noted that, in any event, the obligation would be applicable to a limited category of offences.

113. Some delegations supported further study by the Commission of the question of the possible customary source of the obligation and the crimes covered by it. It

was noted that, for this purpose, the Commission should rely on a systematic survey of the relevant State practice, including international treaties, domestic legislation and both national and international judicial decisions. While some delegations argued that a perceived lack of information from Governments should not delay the work of the Commission, other delegations urged the Commission to allow sufficient time to receive and evaluate information from Governments.

### 3. Scope and content of the obligation

114. Some delegations encouraged the Commission to continue to address the issues relating to the scope and implementation of the obligation, including its alleged alternative character and constitutive elements, the rights of States (including their right to refuse extradition) and the procedure for extradition. Other delegations endorsed the Commission's intention to address the scope of the obligation and the circumstances in which it arises. Some delegations expressed their interest in other issues relating to the topic, such as the question of when States could be considered to have exhausted the obligation. According to one view, the Commission should first study the procedural aspects of the implementation of the obligation, which may clarify substantive issues arising from the topic. For some delegations, due regard should be given to the sovereign right of States not to concede extradition. It was also noted that domestic prosecution of an alleged offender should be given priority when an extradition treaty did not provide otherwise.

### 4. Relationship to universal jurisdiction

115. Some delegations supported further work by the Commission on the link between the obligation to extradite or prosecute and universal jurisdiction. Other delegations doubted that the Commission should study universal jurisdiction in this context, either because they considered that universal jurisdiction was not a precondition for the existence of the obligation or because they saw no direct relationship between the two notions. According to another view, the obligation to extradite or prosecute and universal jurisdiction, while interrelated, should be dealt with separately.

### 5. Surrender of suspects to international criminal tribunals

116. Some delegations suggested that the Commission should consider the relevance of the surrender of suspects to international criminal tribunals for the implementation of the obligation to extradite or prosecute. Others were of the view that the Commission should refrain from examining the issue.

### 6. Draft articles proposed by the Special Rapporteur

117. With regard to draft article 1 proposed by the Special Rapporteur, the change in the title of the provision and the deletion of the adjective "alternative" were welcomed by some delegations. While some delegations approved the use of the phrase "under their jurisdiction", others considered that it could create controversy where States exercised extraterritorial jurisdiction and preferred the alternative formulation "present in the territory of the custodial State".

118. Concerning draft article 2, it was noted that its contents should not become definitive until the completion of the study by the Commission. It was suggested that the definition of "universal jurisdiction" also be included.

119. Some delegations expressed their agreement with draft article 3. The argument was made, however, that the provision was merely a restatement of the principle *pacta sunt servanda*. It was noted by some delegations that the provision should not be interpreted as prejudicing the question of whether the obligation to extradite or prosecute existed under customary international law or as implying that an extradition treaty would be a direct source of a duty to extradite, without the need for additional legislation.

## I. Other decisions and conclusions of the Commission

120. Some delegations welcomed the Commission's contribution on the rule of law at the national and international levels.

121. With regard to new topics, several delegations noted with interest the inclusion of the topics "Treaties over time" and "The most-favoured-nation clause" in the programme of work of the Commission. Nevertheless, it has been pointed out that the studies on those topics should be carefully delimited and that their examination should not jeopardize the ongoing work. Doubt was expressed about the suitability of the topic "The most-favoured-nation clause" for progressive development or codification. A delegation also cautioned against a "one-size-fits-all" approach to the interpretation of the most-favoured-nation clause. The Commission was urged to delimit, but also to reconsider the scope of, the topic "Treaties over time" in order to strive for results of a more practical nature. It was mentioned that a guide based on practice in that area would be useful for States, international organizations and other experts involved in the elaboration and implementation of treaties.

122. The inclusion of other topics in the programme of work of the Commission was also proposed, such as "Law concerning migrations", "Functional protection" and "Legal mechanisms necessary for the registration of sales or other transfer of arms, weapons and military equipment between States". It has been suggested that the Commission considers the question of the regulation of the Internet in international law as well as the topic of *jus cogens*. However, caution against overburdening the agenda of the Commission was also recommended.

123. Several delegations welcomed the proposal to convene a meeting of legal advisers on a regular basis, at least once in a quinquennium. Furthermore, a proposal was made to hold a meeting with delegations on particular topics during the Commission's regular sessions.

124. While praising the special commemorative meeting organized in Geneva in May 2008 on the occasion of the sixtieth anniversary of the Commission, some delegations noted that they also commemorated the anniversary by convening seminars. A forthcoming event organized by the Asian-African Legal Consultative Organization was mentioned.

125. On the relationship between the Commission and the Sixth Committee, some delegations advocated greater engagement with legal advisers. A suggestion that one or two topics on the agenda of the Commission constitute a basis for detailed discussions during the informal meeting of legal advisers during the regular session

of the General Assembly received support. The institutionalization of the meeting with legal advisers was suggested. However, doubt was expressed about the benefits of convening a session of the Commission in New York.

126. The efforts to create a more user-friendly Commission report were commended. However, a longer interval was urged between the issuance of the report and the debate in the Sixth Committee in order to give the delegations more time to respond to the report adequately. Continued improvement of the website relating to the work of the Commission was also called for. Appreciation was expressed to the Codification Division for the substantive support it provided to the Commission and for the various studies undertaken.

127. Some delegations regretted that financial constraints impeded the attendance of special rapporteurs at meetings in which the Commission's report was discussed in the Sixth Committee. Support for the restoration of honorariums for special rapporteurs was expressed.

128. Finally, the fact that international organizations and the International Court of Justice were regularly consulted on matters of direct interest to them was applauded, and a call was made for the expansion of such consultations.